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Supreme Court of the United States

SUE RIVERS, PERSONAL REPRESENTATIVE of the ESTATE of BOBBY LYNN HARRIS, DECEASED; DANNA TAYLOR, PERSONAL REPRESENTATIVE of the ESTATE of LETRICIA KAY HARRIS, DECEASED; SUE RIVERS and DANNA TAYLOR, as CO-PERSONAL REPRESENTATIVES of the ESTATE of CARRIE GAIL HARRIS; SUE RIVERS and DANNA TAYLOR, as CO-PERSONAL REPRESENTATIVES of the ESTATE of CANDY MICHELLE HARRIS; DELLA RUTH HARRIS; and EDGAR BLANKENSHIP,

Petitioners,

vs.

WOOD COUNTY, BILL SKINNER and BILLY BLUNT,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Twelfth Judicial District Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), holding that the Due Process Clause generally imposes no duty on governmental officials to protect private citizens from being deprived of their lives by other private citizens, precludes liability even where a state actor affirmatively exercises his governmental authority to coerce a private citizen to commit a life-threatening crime that results in the deaths of other citizens?

2. Whether a police officer who, acting with deliberate indifference to citizens' substantive due process right to avoid arbitrary governmental deprivations of their lives, affirmatively abuses his authority by ordering a citizen he knows to be drunk to drive while intoxicated, may nevertheless escape liability under 42 U.S.C. § 1983 for the deaths directly caused thereby, simply by relying on the general principle that the Constitution does not require police officers to protect one private citizen from another?

3. Whether *DeShaney* effectively overruled, at least in a substantive due process context, the state coercion theory of state action, under which state-commanded private activity *is* state activity for which the state official who issued the command is constitutionally accountable?

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OPINIONS AND JUDGMENT BELOW

The opinion of the court of appeals (App. 1) has been designated for publication, and is currently found at 2000 Tex. App. Lexis 8653. The order of the district court denying defendants-respondents' motion for summary judgment (App. 17) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 29, 2000. On February 9, 2001, petitioners timely filed a Petition for Review with the Texas Supreme Court. On May 10, 2001, the Texas Supreme Court denied the Petition for Review. (App., at 19-20). On May 25, 2001, petitioners timely filed a Motion for Rehearing of the Petition for Review. On June 28, 2001, the Texas Supreme Court denied petitioners' Motion for Rehearing of the Petition for Review. (App., at 21-22). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, each of which is reproduced in the Appendix, at App. 23.

STATEMENT OF THE CASE

(a) Statement of Facts

The Court of Appeals correctly ruled that there is a genuine issue of material fact on whether Deputy Billy Blunt intentionally and knowingly ordered a drunk onto Wood County roads just moments before that drunk ran a stop sign and collided with another vehicle, killing himself and four members of the Harris family. The summary judgment evidence raising that genuine issue of material fact follows:

On July 27, 1997, at 9:30 p.m., the Wood County Sheriff's Department received a call regarding a domestic disturbance at the residence of Kathryn Croteau. (C.R. 151-152). The Sheriff's Department dispatcher sent Deputy Sheriff Billy Blunt to investigate the call. (C.R. 151). Blunt realized that alcohol abuse is "more often than not" involved in such disturbances. (C.R. 124, 152-53, 194). When Blunt arrived at the Croteau residence at 9:44 p.m., it was obvious that alcohol abuse was involved. (C.R. 156). Blunt found Kathryn Croteau inside her residence with two men. (C.R. 157-58). Croteau was drunk. (C.R. 156). She smelled of alcohol, her eyes were bloodshot, and her speech was slurred. (C.R. 195-96). One of the men with her inside the residence was obviously drunk as well. (C.R. 173). Croteau complained about the conduct of a third man – named Richard Royce Knight – who was standing outside her residence. (C.R. 157, 191). Knight was jealous and becoming belligerent because Croteau was spending time with other men. (C.R. 157, 191).

Knight was a known drunk. Indeed, the evening before, on July 26, Deputy Blunt was present when Knight was arrested for drunk and disorderly conduct at

a Wood County bar. (C.R. 148-49). After Knight was released from jail on the morning of July 27, he began drinking again. Knight's sister testified that Knight was already noticeably drunk when he left home early in the evening of July 27 and drove to Croteau's residence. (C.R. 178). Knight continued drinking when he arrived at Croteau's, as Blunt was well aware. (C.R. 162, 188). Blunt found beer cans scattered around on the ground outside Croteau's house; Knight was the only person outside; and Knight admitted to Blunt that he had consumed at least four beers while at Croteau's. (C.R. 161-62, 188). Knight may have been drinking heavily in the moments before Blunt arrived, thereby intensifying the effects of the alcohol. (C.R. 162, 199). Blunt also knew that people frequently understate the amount they have had to drink – especially when speaking to law enforcement officers. (C.R. 197-98). Knight was obviously and unquestionably drunk. (C.R. 178). Like the night before, Knight's speech was slurred. (C.R. 178). He was unable to walk straight and he was leaning against a pickup for support. (C.R. 178, 153). Knight reeked of alcohol. (Exh. J., 8, 19). Knight was so obviously drunk that Blunt saw no need to take a few moments to administer routine and simple field sobriety tests. (C.R. 188). Blood tests administered after the collision revealed that Knight's blood alcohol level that evening was .17 percent – more than twice the current legal limit in Texas. (C.R. 118).

Despite several options for removing Knight from the Croteau property without endangering innocent citizens of Wood County, (C.R. 164, 168, 199), Blunt ordered Knight into Knight's vehicle and insisted that Knight drive the vehicle out onto public roads. (C.R. 159-60, 184). When Blunt ordered him to leave, Knight protested that

he had been drinking. (C.R. 160). As intoxicated as he was, Knight himself recognized that he was not fit to drive. Neverthess, despite Knight's protests, Blunt threatened to arrest Knight if he refused to drive himself home. (C.R. 159-60, 196).[1] Moments later, five persons were dead.

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[1] One explanation for why Blunt would deliberately ignore the obvious risks posed to the public by ordering a drunk to drive home rather than arresting him, is Blunt's relationship with Knight's sister, Billie White. Blunt knew White due to her work as a bondsman. (C.R. 168). He had given her a ride home from a bar one night, allegedly after he was off duty, and remained at her house playing video games until early morning. (C.R. 168-70, 180, 209-12). Blunt later asked her out on a date. (C.R. 181). Others at the department knew Blunt was romantically interested in White (C.R. 133), and Blunt was quickly selected by those at the scene of the accident in which Knight was killed to take a clergyman to Billie White's to break the news of her brother's death. (C.R. 167). Following the accident, Blunt denied aspects of his romantic pursuit of White, denials that conflicted with the testimony of others. To wit, Blunt denied asking her out, denied playing video games at her house until the wee hours of the morning, and denied being romantically interested in her. (C.R. 168-69, 171). Indeed, Blunt went so far as to deny even knowing that Royce Knight was Billie White's brother, claiming that he discovered the relationship only at the scene of the accident. (C.R. 150). Blunt later admitted that this was not true, and informed plaintiffs that he wished to change his deposition testimony on that point and admit that he indeed knew that Knight was White's brother when he answered the disturbance call at the Croteau residence. (C.R. 215). A reasonable jury could certainly conclude that his deception about his interest in White, and his deception about his knowledge of Knight's relationship to White, could only have been intended to "cover up" the fact that he had a motive for deliberately ignoring Knight's intoxication. And this "cover up," together with the circumstances confronting Blunt at the Croteau residence, reveals that the true reason he did not require Knight to pass basic sobriety tests is because Blunt

In sum, plaintiffs produced evidence that Knight was in an obviously drunken condition just *before* he went to Croteau's, that Knight continued to drink heavily while *at* Croteau's, and that his dead body reeked of alcohol just minutes *after* he left Croteau's. (C.R. 178, 161-162, 188; Exh. J., 8, 19). As the court of appeals acknowledged, a jury could reasonably conclude, based on this summary judgment evidence, that Deputy Blunt deliberately ordered Knight onto the roadways of Wood County despite Blunt's knowledge that Knight was drunk.

(b) Course of Proceedings and Dispositions Below

Nature of the Case:

The plaintiffs seek to recover damages under 42 U.S.C. § 1983 for injuries suffered when four members of a family were killed on July 27, 1997, by a drunk driver named Richard Knight. Plaintiffs allege that Deputy Blunt consciously ordered Knight to commit the crime of driving while intoxicated with deliberate indifference to the threat this criminal conduct would pose to the lives of innocent citizens, in violation of the Due Process Clause of the United States Constitution. Plaintiffs further allege that the Wood County Sheriff, defendant-respondent Bill Skinner, exhibited deliberate indifference to the lives of innocent motorists in Wood County by failing to adequately supervise and train his officers to safely resolve alcohol-related disturbances without causing fatalities, in

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already knew that Billie White's brother was drunk and couldn't pass those tests. Requiring such tests would have been pointless given that Blunt had already decided to instruct the drunk to drive home.

violation of the Due Process Clause of the United States Constitution.

Trial Court and Disposition:

Asserting that Blunt and Skinner were entitled to qualified immunity under 42 U.S.C. § 1983, defendants-respondents filed a Plea to the Jurisdiction and Motion for Summary Judgment. The 402d Judicial District Court of Wood County denied defendant-respondents' motion for summary judgment. (App., at 17-18).

Court of Appeals and Disposition:

Defendants Blunt, Skinner and Wood County appealed to the Twelfth Court of Appeals District of Texas pursuant to Section 51.014(a)(5) of the Texas Civil Practice and Remedies Code. Section 51.014(a)(5) authorizes interlocutory appeals from orders denying summary judgment based on claims of qualified immunity.

The court of appeals rendered its decision on December 29, 2000. The court of appeals reversed the trial court's order denying summary judgment to Blunt and Skinner and rendered judgment in their favor. The court of appeals concluded that a reasonable jury could find that Deputy Blunt had intentionally and knowingly ordered a drunk onto Wood County roads just moments before the drunk ran a stop sign and killed a family of four, but the court held that there could be no liability because Blunt had no duty under the Due Process Clause to protect one private citizen from another. Since the claim against Skinner was based on the constitutional violation alleged against Blunt, the court's decision that

Blunt had no constitutional duty also foreclosed the plaintiff's claim against Skinner. With respect to Wood County, the court of appeals dismissed the appeal because the court lacked jurisdiction.

Texas Supreme Court Petition for Review:

On February 9, 2001, petitioners timely filed a Petition for Review with the Texas Supreme Court. On May 10, 2001, the Texas Supreme Court denied the Petition for Review. (App., at 19-20). On May 25, 2001, petitioners timely filed a Motion for Rehearing of the Petition for Review. On June 28, 2001, the Texas Supreme Court denied petitioners' Motion for Rehearing of the Petition for Review. (App., at 21-22).

SUMMARY OF ARGUMENT

This case turns on a fundamental principle of fault that the court of appeals erroneously concluded does not apply to government officials under 42 U.S.C. § 1983. The principle that an individual is legally responsible for conduct that he has commanded someone else to engage in is pervasive in American law. It is fundamental to tort law. *See, e.g.*, Restatement 2d, Torts, § 877; Restatement 2d, Agency, § 212. It is fundamental to criminal law. *See, e.g.*, 18 U.S.C. § 2; Texas Penal Code, § 7.02(a)(2). And this Court has recognized that it is fundamental to constitutional law. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546-47 (1987). Thus, a governmental official who uses his authority to order

another individual to act is constitutionally accountable for those ordered actions; and this is true regardless of whether the individual receiving the orders is a governmental employee or a private citizen. *See, e.g., Blum,* 457 U.S. at 1004.

The court of appeals could cite no case – *and there is no case in any legal context* – permitting an individual to avoid responsibility for conduct that he has ordered or commanded of another. Therefore, when Deputy Blunt used his authority as a law enforcement officer to intentionally and knowingly command a drunk to engage in life-threatening criminal behavior, Deputy Blunt became legally accountable for the predictable consequences of his outrageous command. When ordering a reluctant drunk (who recognized his own unfitness to operate a motor vehicle) to drive off of private property and out onto public roadways, the resulting deaths of innocent motorists just moments later is a highly predictable consequence. Yet, despite Deputy Blunt's constitutionally deficient behavior, he is apparently not to be held accountable, at least as this case currently stands.

Section 1983 plays a central role in holding state officials accountable for their official abuses of authority. Indeed, Section 1983 is often the only meaningful legal deterrent of public officials' abuse of authority, and often the only source of compensation for citizens injured thereby. Given the court of appeals' decision, however, § 1983 is powerless to remedy even *knowingly life-threatening* abuses of governmental authority, so long as the subject of the official's command to engage in life-threatening conduct is a private party. Because police officers frequently issue commands to private individuals, the

potential impact of the court of appeals' misconstruction of Supreme Court law is self-evident. If the court of appeals' decision is permitted to stand, a police officer literally could order a private citizen to fire a gun toward a crowd and escape liability under § 1983 for a resulting death simply by pleading, "A private citizen did it; and I have no constitutional duty to protect one private citizen from another."

The court of appeals' decision to disregard this Court's precedent that makes a government official constitutionally responsible for private conduct that the official has himself ordered into action, is due to its misapplication of a Fifth Circuit case – *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389 (5th Cir. 1999). *Saenz* itself is little more than a straightforward application of this Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, this Court held that the Constitution generally imposes no duty on governmental officials to protect one private citizen from another. 489 U.S. at 195-96. This is because constitutional restrictions on the exercise of governmental power are couched in terms of negative commands – *e.g.*, DON'T deprive citizens of life without due process – rather than positive obligations – *e.g.*, DO protect private citizens' lives from other private citizens. *Id.* Consequently, if governmental officials choose to remain on the sideline and do nothing about the danger that one private party poses to another, any harm caused is legally attributable to private action rather than state *in*action. But while *DeShaney* holds that government *neutrality* vis-a-vis private violence does not offend the constitution, if government officials are *complicit* in the private violence, they

are liable. *Id.* at 201; *Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995). The Fifth Circuit correctly identified *Saenz* as a government neutrality case. There, officers observed a drunk driver already on the highway and decided not to intervene. 183 F.3d at 390. Under *DeShaney*, the eventual victims of that drunk suffered no *constitutional* deprivation because the police officers who earlier observed the drunk stayed on the sideline and exercised no state authority toward the drunk driver. *Id.* at 392. Had the officers in *Saenz* found a drunk sleeping in his car along the road and, knowing him to be drunk, ordered him to drive home under threat of arrest if he did not, this Court's precedent would have required a different result, just as it does in the present case. *See, e.g., Blum*, 457 U.S. at 1004.

In sum, the court of appeals misapplies one line of Supreme Court precedent (*DeShaney*, along with its Fifth Circuit offspring, *Saenz*) and, as a result, blatantly ignores another line of this Court's precedent (*Blum, San Francisco Arts & Athletics, Inc.*, etc.). This Court should grant review not only to bring Texas' interpretation of federal constitutional law back into accord with this Court's precedent, but to restore, for Texas citizens pursuing their federal remedies in state court, the full remedial scope of 42 U.S.C. § 1983, which is often the only meaningful source of compensation for citizens injured by egregious abuses of state power.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Directly Conflicts with This Court's Precedent Interpreting the Federal Constitution.

The court of appeals' holding that the Constitution (and thus § 1983) does not prohibit a police officer from using his authority to order private parties to engage in life-threatening conduct runs directly counter to three lines of this Court's precedent: 1) This Court's well-settled description of what constitutes a governmental deprivation of life without due process, a description that plainly encompasses Blunt's behavior; 2) This Court's repeated recognition that the Constitution's prohibition of governmental deprivations of fundamental freedoms includes deprivations suffered at the hands of private parties whose behavior has been coerced, ordered, or encouraged by governmental actors; and 3) This Court's distinction between governmental neutrality toward private activity, which is not regulated by the Constitution, and authoritative governmental intervention in private activity, which is clearly subject to constitutional restrictions. For these reasons, this Court should grant the writ and correct the court of appeals' decision.

A. By Ordering Knight to Drive Drunk, Deputy Blunt Acted With Deliberate Indifference to Citizens' Constitutional Right Not to Be Unjustifiably Deprived of Their Lives, and Thereby Violated 42 U.S.C. § 1983.

Section 1983 creates a cause of action against any person who, acting under color of state law, deprives any

citizen of rights secured by the United States Constitution. 42 U.S.C. § 1983. Because Blunt was acting in his official capacity as a law enforcement officer of Wood County when he ordered Knight to drive home drunk, he was clearly acting under color of state law within the meaning of § 1983. *See, e.g., West v. Atkins*, 487 U.S. 42 (1988) (state official acting in his official capacity acts under color of state law). By this official action, Blunt deprived the Harris family of their constitutional right to due process under the Fourteenth Amendment to the United States Constitution, which provides that "no State shall . . . deprive any person of life, liberty, or property, without due process of law."

The Due Process Clause guarantees more than fair procedure – it has a substantive component as well that bars certain governmental actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The touchstone of substantive due process is protection against arbitrary governmental action – the exercise of power without any reasonable justification in the service of a legitimate governmental objective. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This standard is violated when an abuse of power by a government official "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). This Court has recognized that unjustified conduct by government officials that manifests deliberate indifference to human life and limb "shocks the conscience" within the meaning of substantive due process. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 849-50 (1998); *Canton v. Harris*, 489 U.S. 378, 388-389 (1989); *Estelle v. Gamble*, 429 U.S. 97, 104

(1976). The lesser courts have adhered to this pronouncement. *See, e.g., Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), *cert. denied*, 523 U.S. 1118 (1998); *Hill v. Shobe*, 93 F.3d 418 (7th Cir. 1996). While "deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or knowledge that harm will result." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). In other words, a jury may find that, by placing a drunk driver on Wood County roads, Deputy Blunt acted in deliberate indifference to human life and limb even though he did not intend for anyone to be harmed or know that anyone would be harmed.[2] This Court has held that acting with deliberate indifference to a substantial risk of serious harm "is the equivalent of recklessly disregarding the risk." *Farmer*, 511 U.S. at 836.

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[2] This Court explained in *Sacramento v. Lewis* that deliberate indifference to citizens' rights is the usual standard for identifying "conscience-shocking" deprivations of life in contravention of the Fourteenth Amendment. 523 U.S. 833, 850 (1998). In extreme emergency situations, however, such as high speed chases and prison riots, plaintiffs are required to prove more than deliberate indifference in order to establish conscience-shocking governmental abuses of power. *Id.* at 850-54. In such an emergency situation, the plaintiff must establish an intent to harm. *Id.* In the present case, however, because Deputy Blunt was unquestionably engaged in routine police work and under no pressure to make a snap decision regarding Knight, defendants never contested the applicability of the deliberate indifference standard in the district court. Of course, even if they had, this Court in *Lewis* confirmed that in non-emergency situations, like the situation confronting Deputy Blunt, deliberate indifference is the applicable culpability standard. *Id.*

A government official is reckless when the official is "aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

Given that the summary judgment evidence in this case would support a finding that Deputy Blunt knew Knight was drunk, but nevertheless ordered him onto Wood County roads, a rational factfinder could also decide that Blunt's exercise of authority demonstrates a reckless disregard for, or "deliberate indifference" to, innocent citizens' lives. Because this case fits squarely within this Court's settled description of when governmental decisionmaking is condemned by the Due Process Clause, the court of appeals' ruling that plaintiffs' § 1983 claim does not identify a constitutional violation is plainly at odds with this Court's precedent.

B. Government-Commanded Private Activity *Is* Government Activity For Which the Official Issuing the Command is Constitutionally Responsible.

According to the court of appeals, Deputy Blunt is somehow let off the constitutional hook, despite his deliberate indifference to citizens' lives, simply because the plaintiffs' deaths were caused not just by Blunt's deliberate indifference but additionally due to the conduct of a private actor, Royce Knight.[3] The court of

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[3] Of course, since Knight's "private" behavior was directly attributable to Deputy Blunt's deliberately indifferent exercise of governmental authority, it is difficult to discern exactly how

appeals holds that § 1983 does not impose liability on a governmental official for the harmful actions of private parties, not even when that governmental official *orders* the private party to engage in life-threatening criminal behavior. That holding is in direct contravention of this Court's settled interpretation of when state actors become constitutionally responsible for private party actions. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (state officials are responsible for private decisions when they have "exercised coercive power" or "provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State."); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546-47 (1987) (governmental

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this case is lacking that governmental action required to establish a constitutional violation. Indeed, simple concepts of causation demonstrate that Deputy Blunt's deliberately indifferent exercise of governmental power directly caused the deprivation of the Harris family's lives. The threat that Knight would harm an innocent motorist on his way home was the very threat that made Blunt's conduct deliberately indifferent. Defendants are routinely held legally responsible for a third party's harmful conduct when it is a highly predictable result of the defendant's own misconduct. *See, e.g., Travis v. City of Mesquite*, 830 S.W.2d 94, 98-99 (Tex. 1992); *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 737 (Tex. 1998); *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313-14 (Tex. 1987). Thus, traditional notions of causation demonstrate that Deputy Blunt is legally responsible for the harm caused by private party conduct that he himself recklessly ordered. In other words, Royce Knight's private behavior, including his running the stop sign and slamming into another vehicle, was a highly predictable consequence of, and therefore directly caused by, Deputy Blunt's own deliberately indifferent exercise of authority.

coercion or encouragement required before private decision will be deemed a governmental decision).

There is no constitutionally significant distinction between pure governmental activity and government-commanded private activity. Indeed, when an official's exercise of governmental authority consists of commanding, ordering, or directing a private party to engage in conduct, the private party's conduct *becomes* governmental conduct for which the government actor is constitutionally responsible. *Blum*, 457 U.S. at 1004. This theory of state action is pervasive in constitutional law. This Court has not only recognized this theory in Due Process cases (*Blum*), and Equal Protection cases (*San Francisco Arts & Athletics, Inc.*), but in every constitutional context in which the issue has arisen. For example, although the Fourth Amendment does not normally regulate private party searches of an individual's house, it does regulate police officers who coerce or direct the private party's search. *Coolidge v. New Hampshire*, 403 U.S. 443, 487-89 (1971). Similarly, police officers violate the Sixth Amendment when they direct private parties to elicit and surreptitiously record incriminating statements from an indicted defendant. *See Massiah v. United States*, 377 U.S. 201, 206 (1964). And police officers act in violation of Substantive Due Process when they instruct private parties to coerce confessions. *See Arizona v. Fulminante*, 499 U.S. 279, 283-88 (1991). In the same vein, school officials violate the First Amendment by inviting private parties to pray at school functions. *See Lee v. Weisman*, 505 U.S. 577 (1992). And no prison official has ever had the temerity to suggest that executions could be carried out free of the Eighth Amendment so long as those prison officials

authorized private parties (perhaps the victim's family) to select and implement the method of execution.

There are few legal propositions more deeply imbedded in American law than the one holding that wrongful conduct commanded, authorized, or encouraged by another becomes the wrongful conduct not only of the one who engaged in it, but also of the one who commanded it. It is fundamental to *tort* law. *See* Restatement 2d, Torts, § 877; Restatement 2d, Agency, § 212. It is fundamental to *criminal* law. *See, e.g.,* 18 U.S.C. § 2(a) (whoever "commands, induces, or procures" the commission of an offense is "punishable as a principal"); § 2(b) (whoever "willfully causes an act to be done which if directly performed by him or another would be an offense . . . is punishable as a principal"); *see also* Texas Penal Code, § 7.02(a)(2) (one who commands, orders, encourages, or directs another to engage in criminal activity shares equal responsibility for that activity). And, as demonstrated herein, the principle that a governmental official is responsible for the conduct he has commanded of another is also fundamental to *constitutional* law. In short, this basic principle of accountability is applicable in every legal context and to every individual, whether a business person, a bank robber, or a police officer. Thus, under the facts of this case, Knight's drunken driving *is* governmental activity for which Deputy Blunt is constitutionally accountable.

C. The Court of Appeals Failed to Appreciate the Constitutional Significance of the Distinction Between Authoritative Governmental Intervention in Private Activity and Governmental Neutrality Toward Private Activity.

The court of appeals arrived at its remarkable conclusion by failing to appreciate that the Fifth Circuit case on which it primarily relies – *Saenz* – and the Supreme Court case on which the *Saenz* holding rests – *DeShaney* – turn on the *absence of any constitutionally significant state action* rather than on the simple presence of private party behavior. *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195-97, 201 (1989); *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389, 391-92 (5th Cir. 1999).

In *DeShaney*, government officials returned a child to his abusive home, after having earlier removed him, thereby leaving things the way they originally found them. 489 U.S. at 201. Because the victim was in the same position as if the government had done nothing, the Court found that the child's subsequent loss of life was attributable to private action alone. *Id.* The Court in *DeShaney* recognized the difference between an essentially "neutral" governmental role in a homicide perpetrated by a private party, and governmental activity that changes the status quo to the eventual victim's substantial disadvantage. *Id.* at 201. Thus, in finding no due process violation on *DeShaney's* facts, the Court expressly emphasized that the state "placed [DeShaney] in no worse position than that in which he would have been had it not acted at all," and further emphasized that the State "played no part in the [ ] creation" of the danger facing DeShaney, "nor did it do anything to render him

any more vulnerable to [the danger]." *Id.* Of course, when an affirmative governmental exercise of authority – such as Deputy Blunt's command – directly causes one private citizen to be killed by another, then government officials are not being faulted merely for standing on the sidelines. Rather, the governmental officials are being held responsible based on *their own affirmative exercise of governmental power.*

In *Saenz*, police officers spotted a drunk driver but stayed on the sideline. 183 F.3d at 390. The officers did nothing to enhance the private threat to other motorists that already existed; they simply left the status quo unchanged. *Id.* While this certainly qualifies as poor policing, the officers had no § 1983 liability for the deaths subsequently caused by that drunk driver. *Id.* at 391-92. Because the officers left things as they originally found them, the loss of life was attributable to private action and not state action. *See id.* at 392. Thus, *Saenz* is little more than a simple application of the *DeShaney* principle. *See id.*

Of course, there is a monumental difference between holding police officers liable for simply failing to prevent crime, and holding them liable for crimes they have personally caused through their own deliberately indifferent exercise of authority. *DeShaney* itself emphasizes that the essence of the Due Process Clause is the prohibition of governmental actions that unjustifiably deprive citizens of their life. *Id.* at 195-96. Nothing in *DeShaney* casts doubt on the continued vitality of the aforementioned Supreme Court precedents that treat government-ordered private action as the equivalent of government action for constitutional purposes. *See Bank of Illinois v. Over*, 65 F.3d

76, 78 (7th Cir. 1995) (All *DeShaney* holds "is that the Constitution does not impose a legally enforceable duty on state officers to protect people from private violence. *If the officers are complicit in the violence, they are liable.*") (emphasis added).

Because the plaintiffs' theory premises liability on Blunt's reckless *intervention* into private activity, rather than on his *failure* to intervene in private activity, *DeShaney* and *Saenz* are simply inapposite. Consequently, there is no possible justification for imposing the "known victim" requirement that the Fifth Circuit imposed on the *Saenz* plaintiffs. Such a requirement makes sense only in the limited context of a true government neutrality case where a plaintiff's theory attempts to place fault on officials' *failure* to intervene in private activity. A failure to intervene normally is actionable only when the state is exercising custodial or other coercive control over the eventual victim of private violence – such as by placing him in a prison cell with violent cellmates. *See DeShaney*, 489 U.S. at 198-200. Because such cases normally involve a "known victim," the Fifth Circuit in *Saenz* joined a minority of circuits treating this as a requirement in "failure to protect"cases. The present case, however, is not a "failure to protect" case. The Harris family was killed by Blunt's action, not his *in*action, by his reckless intervention, not his failure to intervene, by his affirmative exercise of coercive power, not his mere omission to employ state power. Indeed, no other court has ever imposed a "known victim" requirement in a case like the present one. Such a requirement would permit officers to order private persons to fire a gun toward a crowd, under

threat of arrest, and disclaim responsibility for any resulting death.

The court of appeals' difficulty with the distinction between government action and government *in*action reveals a fundamental misunderstanding of the nature of the Federal Constitution, including the Due Process Clause. As explained in *DeShaney*, the Due Process Clause, like other constitutional guarantees, provides protection *from* governmental abuse and does not create a positive right *to* governmental services such as protection from criminals and private tortfeasors. 489 U.S. at 195. The distinction between government action and inaction, therefore, is hardly arbitrary, but goes to the heart of the Constitution's role. Constitutional prohibitions are red lights not green lights. Government officials who stay on the sideline and permit private activity to take its course necessarily do not run any red lights. But when government officials choose to involve themselves in private activity and affirmatively exercise their authority over private parties, as Deputy Blunt did, they are obligated to respect those red lights, one of which is the obligation to avoid exercising authority in deliberate indifference to human life and limb. Deputy Blunt got involved, exercised his authority, and consequently, was required to observe the Due Process Clause's red light. He didn't. The plaintiffs' theory in this case rests squarely on an abusive exercise of governmental power, undertaken in deliberate indifference to citizens' constitutional right to be free from an unjustifiable deprivation of life, that directly resulted in plaintiffs' deaths. That is the essence of a constitutional tort under § 1983.

Since *DeShaney*, this Court has never taken the opportunity to define the circumstances under which a

state actor becomes sufficiently responsible for a private danger so as to be held legally accountable when citizens are deprived of their lives due to the operation of that private danger. This Court should use the present case as a vehicle to explain the reach of *DeShaney* and to confirm that *DeShaney* in no way unsettles this Court's state action doctrine holding state officials constitutionally accountable for private actions that those officials have ordered or commanded into action by affirmatively employing their coercive power.

CONCLUSION

For the reasons stated, Petitioner respectfully requests this Court to issue a writ of certiorari to review the court of appeals' decision and bring Texas' § 1983 jurisprudence into accordance with the Federal Constitution.

Respectfully submitted,

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NO. 12-00-00070-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

WOOD COUNTY, BILL SKINNER AND BILLY BLUNT, APPELLANTS	§	*APPEAL FROM THE 402ND JUDICIAL DISTRICT COURT OF WOOD COUNTY, TEXAS*
V.	§	
SUE RIVERS, PERSONAL REPRESENTATIVE OF THE ESTATE OF BOBBY LYNN HARRIS, DECEASED, DANNA TAYLOR, PERSONAL REPRESENTATIVE OF THE ESTATE OF LETRICIA KAY HARRIS, DECEASED, SUE RIVERS AND DANNA TAYLOR AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF CARRIE GAIL HARRIS, SUE RIVERS AND DANNA TAYLOR, AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF CANDY MICHELE HARRIS, DELLA RUTH HARRIS AND EDGAR LEE BLANKENSHIP, APPELLEES	§	

This is an appeal of a trial court's interlocutory order denying a motion for summary judgment, in which Wood County, its Sheriff, Bill Skinner, and its Deputy Sheriff, Billy Blunt, asserted qualified immunity as an affirmative

defense to the 42 U.S.C. § 1983 claim filed by Appellees.[1] In one issue, Appellants assert that the denial was error. For the reasons stated below, we dismiss the appeal as to Wood County, reverse the order of the trial court, and render judgment as to the claims against Bill Skinner and Billy Blunt.

BACKGROUND

This suit arises out of a tragic automobile accident wherein Richard Royce Knight ("Knight"), failed to observe a highway stop sign and collided with a vehicle occupied by four members of the Harris family. All five persons were killed. A toxicology report showed that Knight's blood alcohol level was 0.17 at the time of the accident. Just prior to the accident, Appellant Billy Blunt ("Blunt"), a deputy Sheriff of Wood County, responded to a disturbance call at the home of Kathryn Croteau ("Croteau"). When he arrived, he found Knight outside the residence. During their conversation, Knight admitted to having drunk four beers. Appellees' summary judgment evidence shows that Blunt, when he told Knight to leave the premises, essentially instructed Knight to drive his vehicle while intoxicated. Blunt denies this and claims

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[1] Appellees are Sue Rivers, Personal Representative of the Estate of Bobby Lynn Harris, Deceased, Danna Taylor, Personal Representative of the Estate of Letricia Kay Harris, Deceased, Sue Rivers and Danna Taylor, as Co-Personal Representatives of the Estate of Carrie Gail Harris, Sue Rivers and Danna Taylor, as Co-Personal Representatives of the Estate of Candy Michele Harris, Della Ruth Harris and Edgar Lee Blankenship.

that he did not observe any signs that Knight was intoxicated, but for the purposes of summary judgment analysis all evidence favoring Appellees, the non-movant, will be taken as true. Croteau advised Blunt that she wanted Knight to leave, and that if he did not, she wanted to file trespassing charges against him. Blunt communicated this to Knight who then left the premises by driving away in his vehicle. Shortly thereafter, the accident occurred. Appellant Wood County Sheriff Bill Skinner ("Skinner") was not at Croteau's at the time of the incident. He was notified of the facts after the accident.

Appellees sued Wood County, Blunt, Skinner, and others alleging various causes of action including a violation of 42 U.S.C. § 1983 claiming that Wood County, Blunt, and Skinner deprived the Harris accident victims of life without due process of law under the Fourteenth Amendment to the Constitution of the United States. Specifically, they assert that Blunt is liable for allowing or instructing Knight to operate a vehicle while intoxicated, and in the case of Skinner for negligently training and supervising Blunt. Appellees further claim that Wood County is liable for any wrongful acts or omissions of Skinner in his capacity as a sheriff. Appellants filed their motion for summary judgment based on several grounds including a claim of qualified immunity. Eventually, Appellees dismissed all defendants except Wood County, Blunt and Skinner and dismissed all state causes of actions leaving only their § 1983 claims. After preliminary rulings by the trial court, the summary judgment motion was heard and denied. This appeal followed.

Wood County

We will first address Wood County's appeal. Wood County appeals from an interlocutory order denying summary judgment pursuant to § 51.014(5) of the Texas Civil Practice and Remedies Code, which allows an interlocutory appeal from an order denying qualified immunity. Unlike local governments sued under the Tort Claims Act, a local government sued under § 1983 has no immunity even if its employee is entitled to qualified immunity. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166, 113 S. Ct. 1160, 1162, 122 L.Ed.2d 517 (1993); *Bexar Cty. v. Giroux-Daniel*, 956 S.W.2d 692, 695 (Tex. App. – San Antonio 1997, no pet.). Accordingly, we have no jurisdiction over Wood County's appeal because it cannot be based on Blunt or Skinner's assertion of qualified immunity. *See City of Harlingen v. Vega*, 951 S.W.2d 25, 27-28 (Tex. App. – Corpus Christi 1997, no pet.). Wood County's appeal is dismissed.

The Standard of Review

The standard of review on appeal of a summary judgment is whether the movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Carrera v. Yepez*, 6 S.W.3d 654, 660 (Tex. App. – El Paso 1999, pet. dism'd w.o.j.). In the case of a qualified immunity defense to a § 1983 claim, once the defendant official pleads good faith and demonstrates

that his actions occurred in the context of his discretionary authority, the burden shifts to the plaintiff to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law. *Salas v. Capenter,* 980 F.2d 299, 306 (5th Cir. 1992); *Carrera,* 6 S.W.3d at 661. In the instant case Blunt and Skinner have pleaded good faith and it is uncontested that their actions occurred in the context of their discretionary authority. Thus, we address the narrow issue of whether their actions violated to clearly established law.

In determining the applicability of qualified immunity in a § 1983 claim, we engage in a two-step inquiry. First, we must determine whether deprivation of a viable constitutional right has in fact been alleged at all. If such a deprivation has been alleged, only then do we proceed to determine whether that viable constitutional right was clearly established at the time of the alleged violation. *Wilson v. Lane,* 526 U.S. 603, 609, 119 S. Ct. 1692, 1697, 143 L.Ed.2d 818 (1999). This process facilitates the goal of qualified immunity which is to protect public officials both from undeserved liability and from the difficulties associated from protracted litigation. *Id.* Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct to the benefit of the officers and the general public. *Id.* Our analysis of the first step is dispositive of the case and thus, we do not reach the second step.

ANALYSIS

Section 1983 provides that every person who, under color of law, subjects any citizen to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. 42 U.S.C.A. § 1983 (Supp. 1994-1999). The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall deprive any person of life, liberty, or property, without due process of law. Thus, Appellees claim that Blunt violated the Fourteenth Amendment by depriving the Harris family of life without due process of law and is therefore liable under § 1983. This claim invokes the substantive rather than the procedural component of the Due Process Clause, that is, that Blunt was categorically obligated to protect the Harrises under these circumstances.

Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The United States Supreme Court addressed this issue in *DeShaney v. Winnebago Co. DSS*, 489 U.S. 189, 195-96, 109 S. Ct. 998, 1003, 103 L.Ed.2d 249 (1989). In *DeShaney* the court was called upon to discern duty, if any, of a child protective services agency to protect a young boy from the murderous abuse of his own father once it had knowledge of the danger. There, the Supreme Court stated "The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property . . . but its language cannot fairly be extended to impose an affirmative obligation on the State to insure that those interests do not

come to harm through other means." *Id.* The court pointed out that the Due Process Clause was intended to prevent government from abusing its power, or employing it as an instrument of oppression, *i.e.*, "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* Thus, it follows that if the Due Process Clause does not require the State to provide its citizens with particular protection, then the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general rule, then, a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

However, Appellees argue that the instant case in not a "failure to protect" case where officers simply chose to remain on the sideline and allow private action to take its course, but that it is a "State created danger" case. They contend that when government officials affirmatively exercise their authority to order a private party's dangerous actions and thereby cause an injury, those government officials should be held responsible for their own conduct and cannot logically attribute the deprivation to purely private activity. In other words, Appellees' theory is that the Constitution was violated when Blunt directly caused the loss of life by commanding the private party to drive while intoxicated.

In support of their position, Appellees cite *Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L.Ed. 534 (1982) and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546-47, 107 S. Ct. 2971, 97 L.Ed. 427 (1987). Blum arose out of a claim concerning private nursing home patients who alleged that they had

not received certain procedural safeguards in conjunction with decisions by the home's utilization review committee to transfer them to a lower level of care, which in turn led to the reduction in their Medicaid benefits. *Blum,* 457 U.S. at 994-96. There the Supreme Court concluded that there was insufficient indicia of State action to implicate the Fourteenth Amendment simply because the State acted in accordance with private decisions in adjusting Medicaid benefits. *Blum,* 457 U.S. at 1005. In *San Francisco Arts & Athletics, Inc.,* the Court considered whether the United States Olympic Committee was a governmental actor for the purposes of evaluating a Fifth Amendment discrimination claim. There the Court found that the Committee's decision to enforce its exclusive right to use the term "Olympic" thereby denying San Francisco Arts & Athletics the opportunity to sponsor an event entitled the "Gay Olympic Games," simply was not a governmental decision. *San Francisco Arts & Athletics, Inc.,* 483 U.S. at 547.

Although *Blum* and *San Francisco Arts & Athletics, Inc.,* include recitations of general principles concerning governmental liability for private decisions made under the influence of governmental coercion, neither case includes a holding to that effect. Furthermore the court did not use either opportunity to further explain the general principles recited or provide examples of coercion sufficient to impute liability. Neither case was decided under the substantive due process component of the Fourteenth Amendment (the constitutional provision at issue here), and both are factually and legally inapposite to the issues in this case.

Appellees, like some federal circuit courts, refer to a statement in the United States Supreme Court's *DeShaney* opinion to create the doctrine of state created danger. In *DeShaney* the child protective services of Winnebago County had actually taken affirmative steps to protect Joshua DeShaney but nevertheless returned him to his father who eventually took Joshua's life. In the opinion the Supreme Court stated: "That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *DeShaney*, 489 U.S. at 201. This statement has led some circuits to find that State actors can be liable under § 1983 if they acted affirmatively in such a way as to increase the danger faced by particular individuals. *See, e.g., Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996) (considering the liability of officers who detained an obviously inebriated couple, eventually sending the wife home alone, thereby separating her from her private source of rescue and exposing her to injury); *Wood v. Ostrander*, 879 F.2d 582, 590 (9th Cir. 1989) (considering liability of an officer who arrested plaintiff's companion, leaving her alone, at night, in a high crime area where she was eventually raped).

The Fifth Circuit has questioned whether the United States Supreme Court intended that comment in *DeShaney* to carve out an area of State actor liability under § 1983. *See Johnson v. Dallas ISD*, 38 F.3d 198, 201 (5th Cir. 1994); *Leffall v. Dallas ISD*, 28 F.3d 521, 530-31 (5th Cir. 1994). Instead, the Fifth Circuit has interpreted the *DeShaney*

language as nothing more than a contextual observation by the Supreme Court. *Leffall*, 28 F.3d at 530-31; *see also Randolph v. Cervantes*, 130 F.3d 727, 731 (5th Cir. 1997) (declining to recognize the state created danger doctrine); *Doe v. Hillsboro Independent School District*, 113 F.3d 1412, 1415 (5th Cir. 1997) (noting that the Fifth Circuit has never sustained liability on state created danger grounds). Since the *DeShaney* decision in 1989, the Supreme Court does not appear to have predicated State actor liability on a State created danger theory nor has that theory been adopted by the Fifth Circuit.

Moreover, in 1999, the Fifth Circuit handed down *Saenz v. Heldenfels Bros. Inc.*, 183 F.3d 389, 391 (5th Cir. 1999), in which it has apparently established the known victim requirement in the application of the Due Process Clause. In *Saenz* it was alleged that two officers observed a driver whom they believed was driving while intoxicated. The junior officer sought to investigate the situation but was ordered by the senior partner to take no action in the matter. A few minutes later the suspect crashed into an oncoming vehicle and killed two of its occupants. Tests showed that the suspect, at the time of the accident, had a blood alcohol level of .21, well over the legal limit. In holding that the Plaintiffs failed to allege the deprivation of a constitutional right, the court reminded us that the "guarantee of due process is limited to situations where a State officer *deliberately chooses to deprive a person* of life, liberty, or property" (emphasis ours) and that the Due Process Clause of the Fourteenth Amendment cannot operate to impose liability where the State actor in question has *no subjective awareness of the victim. Saenz*, 183 F.3d at 391. The court observed that a

contrary conclusion would "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," *citing Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L.Ed.2d 405 (1976).

Furthermore the court in *Saenz* states that its holding is virtually compelled by the United States Supreme Court's decision in *DeShaney* and reasons that "[I]f a state officer has no duty to protect an identified person from a known danger presented by a third party, he cannot offend due process by permitting an intoxicated driver to remain on the highway, thereby increasing the risk of harm to unidentified and unidentifiable members of the public. *Saenz*, 183 F.3d at 392. The Third Circuit, which does impose liability based on the state created danger theory, concurs with the known victim requirement in *Saenz* and requires a relationship between the State and the injured person in determining whether state created danger liability is applicable. *See Kneipp*, 95 F.3d at 1209 n. 22 ("the relationship requirement under the state created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense").

In the instant case, neither Blunt nor Skinner was aware that the victims were on the highway and did not have any relationship established with them at the time. The tragedy here was caused by Knight. The known victim requirement is a logical result of the limited scope of the Due Process Clause. It is impossible to deliberately deprive a person of a constitutional right without being aware that the person exists. The Appellees have cited no Texas or Fifth Circuit cases which would authorize us to

extend substantive due process to situations similar to the facts of this case. And because of the open-ended nature of substantive due process, the supreme court has cautioned courts to use restraint when asked to find new rights secured by the Due Process Clause. *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068, 117 L.Ed.2d 261 (1992). We thus conclude that no claim for deprivation of constitutional rights has been alleged against Blunt.

SHERIFF SKINNER

Skinner was the immediate supervisor of Blunt but had no personal involvement in the facts which are the basis for this suit. It is well settled that supervisory officials, such as Skinner, cannot be held vicariously liable for their subordinates' actions under § 1983 under a respondeat superior theory. *Monel v. City of New York Dept. of Social Services*, 436 U.S. at 690-691, 98 S. Ct. at 2035-36. However, Appellees allege that Skinner is liable under § 1983 for inadequate training and supervision of Blunt. According to the Fifth Circuit, a supervisory official may be held liable under § 1983 for the wrongful acts of a subordinate when the official breached a duty imposed by state or local law and this breach *caused a constitutional injury. Smith v. Brenoettsy*, 158 F.3d 908, 911-12 (5th Cir. 1998). In order to find supervisory liability, the plaintiff must show the following:

> (1) the supervisor failed to supervise or train the subordinate official;

(2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and

(3) the failure to train or to supervise amounts to deliberate indifference.

Smith v. Brenoettsy, 158 F.3d at 911-12. Based on our previous analysis regarding Blunt, Skinner cannot be held liable for actions of a subordinate that do not involve deprivation of a constitutional right. Since Blunt's actions did not violate the Harrises' substantive due process rights, it follows that Appellees have not met the causal link requirement in element (2) above. Thus, it is unnecessary for us to address elements (1) and (3).

Conclusion

For these reasons, we hold that Appellees have failed to allege the deprivation of a right secured by the constitution, and therefore, their § 1983 claim fails. Because of our holding, we do not reach the second inquiry of whether the constitutional right was clearly established when the conduct at issue occurred. Moreover, we do not reach the issue of whether the individual Appellants have met their burden of establishing that they are entitled to a qualified immunity defense. *See Anderson v. Creighton,* 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987). Accordingly, the order of the trial court is reversed and judgment is rendered that Appellees take nothing against

Appellants, Blunt and Skinner. As noted above, the appeal is dismissed as to Appellant Wood County.

ROBY HADDEN
Justice

Opinion delivered December 29, 2000.

Panel Consists of Hadden, J., Worthen, J., and Ramey, Jr., Retired Chief Justice, Twelfth Court of Appeals, sitting by assignment.

(PUBLISH)

[SEAL]

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

DECEMBER 29, 2000

NO. 12-00-00070-CV
WOOD COUNTY, BILL SKINNER,
AND BILLY BLUNT,
Appellants
V.
SUE RIVERS, ET AL.,
Appellees

Appeal from the 114th Judicial District Court
of Wood County, Texas (Tr.Ct.No. 97-628)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being inspected, it is the opinion of the court that AS TO APPELLANT WOOD COUNTY THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION, and that the order of the trial court below be REVERSED and the cause RENDERED IN FAVOR OF APPELLANTS BILLY BLUNT AND BILL SKINNER.

It is therefore ORDERED, ADJUDGED and DECREED that THE APPEAL OF APPELLANT WOOD COUNTY BE AND IS HEREBY DISMISSED; and that the order of the court below be REVERSED and that the judgment be and is hereby RENDERED THAT APPELLEES TAKE NOTHING FROM APPELLANTS BILL SKINNER AND BILLY BLUNT; and that all costs of this appeal be, and the same are, adjudged against APPELLEES SUE RIVERS, PERSONAL REPRESENTATIVE OF THE ESTATE OF BOBBY LYNN HARRIS, DECEASED, DANNA TAYLOR, PERSONAL REPRESENTATIVE OF THE ESTATE OF LETRICIA KAY HARRIS,

DECEASED, SUE RIVERS AND DANNA TAYLOR, AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF CARRIE GAIL HARRIS, SUE RIVERS AND DANNA TAYLOR, AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF CANDY MICHELE HARRIS, DELLA RUTH HARRIS AND EDGAR LEE BLANKENSHIP, for which let execution issue; and that this decision be certified to the court below for observance.

Roby Hadden, Justice.

Panel consisted of Hadden, J., Worthen, J., and Ramey, Jr., C.J., Retired Chief Justice, Twelfth Court of Appeals, sitting by assignment.

CAUSE NO. 97-628

SUE RIVERS, PERSONAL REPRESENTATIVE OF THE ESTATE OF BOBBY LYNN HARRIS, DECEASED; DANNA TAYLOR, PERSONAL REPRESENTATIVE OF THE ESTATE OF LETRICIA KAY HARRIS, DECEASED; SUE RIVERS AND DANNA TAYLOR, AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF CARRIE GAIL HARRIS; SUE RIVERS AND DANNA TAYLOR, CO-PERSONAL REPRE-SENTATIVES OF THE ESTATE OF CANDY MICHELLE HARRIS; DELLA RUTH HARRIS; AND EDGAR BLANKENSHIP	)	IN THE DISTRICT COURT
Plaintiffs,	)	
vs.	)	
HARRIS LINE SERVICE COMPANY, INC. WOOD COUNTY; BILL SKINNER; BILLY BLUNT; JOE THOMPSON; AND BILLIE WHITE, AS PERSONAL REPRESENTATIVE of the ESTATE of RICHARD ROYCE KNIGHT, DECEASED	)	OF WOOD COUNTY, TEXAS
Defendants.	)	114TH JUDICIAL DISTRICT

ORDER ON DEFENDANTS' MOTION FOR REHEARING OF SUMMARY JUDGMENT

On October 24, 1999, this Court signed an Order Granting Defendants' Plea to the Jurisdiction and Motion for Summary Judgment. On December 15, 1999, this Court signed an Order granting Plaintiffs' Motion for New Trial and Reconsideration of Order Granting Summary Judgment. The Court vacated its earlier Order Granting Defendants' Plea to the Jurisdiction and Motion for Summary Judgment.

On February 24, 2000, this Court reheard Defendants' Motion for Summary Judgment, which the Court GRANTS IN PART and DENIES IN PART.

Defendant Joe Thompson's Motion for Summary Judgment on the claims against him is hereby GRANTED.

The Motion for Summary Judgment on Plaintiffs' common law negligence claims by Defendants Billy Blunt, Bill Skinner, and Wood County is hereby GRANTED.

Defendant Wood County's Motion for Summary Judgment on Plaintiffs' request for exemplary damages is hereby GRANTED.

Except as expressly GRANTED herein, Defendants' Motion for Summary Judgment is hereby DENIED.

Signed this 1 day of March, 2000.

/s/ [ILLEGIBLE]
JUDGE PRESIDING

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May 10, 2001

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RE: Case Number 01-0113
Court of Appeals Number: 12-00-00070-CV
Trial Court Number: 97-628

Style: SUE RIVERS, personal representative of THE ESTATE OF BOBBY LYNN HARRIS, deceased, DANNA TAYLOR, personal representative of THE ESTATE OF LETRICIA KAY HARRIS, deceased, SUE RIVERS and DANNA TAYLOR, as co-personal representatives of THE ESTATE OF * * * *

v.

WOOD COUNTY, BILL SKINNER and BILLY BLUNT

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

cc: Ms. Cathy S. Lusk, Clerk
Novis Wisdom

(LOGO) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

June 28, 2001

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v.

WOOD COUNTY, BILL SKINNER and BILLY BLUNT

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by /s/ Gena Pelham
Gena Pelham, Deputy Clerk

cc: Ms. Cathy S. Lusk, Clerk
Novis Wisdom

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States. Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously

taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
SEP 4 200
OFFICE OF THE CLERK

No. 01-0085

In The

Supreme Court of the United States

SUE RIVERS, PERSONAL REPRESENTATIVE of the ESTATE of BOBBY LYNN HARRIS, DECEASED; DANNA TAYLOR, PERSONAL REPRESENTATIVE of the ESTATE of LETRICIA KAY HARRIS, DECEASED; SUE RIVERS and DANNA TAYLOR, as CO-PERSONAL REPRESENTATIVES of the ESTATE of CARRIE GAIL HARRIS; SUE RIVERS and DANNA TAYLOR, as CO-PERSONAL REPRESENTATIVES of the ESTATE of CANDY MICHELLE HARRIS; DELLA RUTH HARRIS; and EDGAR BLANKENSHIP,

Petitioners,

v.

BILL SKINNER and BILLY BLUNT,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Twelfth Judicial District Of Texas

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In responding to a domestic disturbance call, Deputy Blunt informed Knight of Croteau's intent to press trespassing charges if Knight did not vacate her property. Knight, who was allegedly intoxicated at the time, chose to drive himself away. A short time later, Knight caused an accident which resulted in the deaths of the Harrises. The Texas Court of Appeals concluded that Deputy Blunt's actions did not violate the Harrises' Fourteenth Amendment rights. Was this holding in error? If not, were Deputy Blunt and Sheriff Skinner nevertheless entitled to qualified immunity on the basis that those rights were not clearly established at the time of the incident?

LIST OF PARTIES AND RULE 29.6 LIST

The parties to the proceeding below were the Petitioners Sue Rivers, Personal Representative of the Estate of Bobby Lynn Harris, Deceased; Danna Taylor, Personal Representative of the Estate of Letricia Kay Harris, Deceased; Sue Rivers and Danna Taylor, as Co-Personal Representatives of the Estate of Carrie Gail Harris; Sue Rivers and Danna Taylor, as Co-Personal Representatives of the Estate of Candy Michelle Harris; Della Ruth Harris; and Edgar Lee Blankenship, the Respondents Bill Skinner and Billy Blunt, and the Respondents' co-Defendant Wood County, Texas.

None is a corporation with parent companies or non-wholly-owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Bill Skinner and Billy Blunt respectfully request that this Court deny the petition for writ of certiorari in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Twelfth Court of Appeals District at Tyler, Texas, can be found online at *Wood County v. Rivers*, No. 12-00-00070-CV, 2000 Tex. App. LEXIS 8653 (Tex. App. – Tyler 2000, pet. denied). While the decision is designated for publication in the Southwestern Reporter, no citation has been determined. The Court of Appeals' opinion is reprinted in the appendix to the petition at pages App. 1 through App. 14.

JURISDICTION

The judgment of the Tyler Court of Appeals was rendered on December 29, 2000. The Supreme Court of Texas denied the petitioners' petition for review on May 25, 2001, and denied the petitioners' motion for rehearing on June 28, 2001.

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. Both are reprinted in the appendix to the petition at pages App. 23 through App. 25.

STATEMENT OF THE CASE

(a) Statement of Facts

The parties' differences regarding the facts in this case are *primarily* confined to the detail necessary to resolve the narrow issues that were before the Tyler Court of Appeals, and in turn, this Court. Nevertheless, the respondents offer clarification of particular factual points, which represent rather flagrant misrepresentations of the facts on the petitioners' part.

This suit arises out of a tragic accident in which a family of four lost their lives to a drunk driver, Richard Royce Knight. The Harrises were traveling northbound on State Road 14 in Wood County, Texas, on the evening of July 27, 1997, when the pickup truck in which they were riding was struck by Knight, who failed to observe the stop sign on Farm-to-Market Road 2088. (C.R. 20-27). The Harrises and Knight all died as a result of the collision. (C.R. 179). Knight's blood alcohol content was 0.17% at the time of the accident. (C.R. 22-23).

Prior to the accident, Wood County Deputy Sheriff Billy Blunt had responded to a disturbance call at the home of Kathryn Croteau. (C.R. 20). There he encountered Knight and eventually learned that Knight had

consumed four beers over the course of a few hours. (C.R. 141). Deputy Blunt did not, however, observe any signs that led him to believe that Knight was intoxicated.[1] (C.R. 142). Distraught over Knight's belligerent displays of jealousy and fearing that he would start a fight with her other guests, Croteau insisted that Knight leave or she would press trespassing charges. (C.R. 157, 159-60). Deputy Blunt informed Knight of Croteau's position, and Knight left the premises. (C.R. 159, 162-63). According to one witness, Deputy Blunt said later that he actually told Knight to leave the scene. (C.R. 184). Shortly thereafter, the accident occurred.

The record contains no evidence that Deputy Blunt ordered Knight to drive his vehicle. At best for the petitioners, the record contains evidence that Deputy Blunt told Knight, who was intoxicated, to leave Croteau's property. The petitioners, however, have gone beyond the record to represent to the Court that the facts of this case actually establish something far more sinister.

For example, the petitioners cite page 188 of the clerk's record for the proposition that "Knight was so

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[1] While the petitioners assert that Knight was "obviously and unquestionably drunk," that his "speech was slurred," and that "he was unable to walk straight," it is clear from their record references that such observations were not made by Deputy Blunt at the scene but earlier in the day by Knight's sister, who professed special knowledge of her brother's status of sobriety. (C.R. 178). Deputy Blunt testified that, when he encountered Knight at Croteau's home some time later, Knight's eyes were clear, his speech was fine, and his balance was good. (C.R. 142). The petitioners provided no evidence to contradict Deputy Blunt's assessment of Knight at the relevant time.

obviously drunk that Blunt saw no need to take a few moments to administer routine and simple field sobriety tests." (Pet. at 3). Actually, page 188 contains Deputy Blunt's answers to requests for admissions, in which he merely admits that he never asked Knight to submit to a field sobriety test. (C.R. 188). There is no indication, either through the requests themselves or Deputy Blunt's answers, as to his motivation for choosing not to field test Knight; in fact, on the very same page of the record, Deputy Blunt denied believing Knight to be intoxicated. (C.R. 188).

The petitioners further suggest that Deputy Blunt "insisted that Knight drive his vehicle onto public roads" (indeed, that he "threatened to arrest Knight if he refused to drive himself home") and that Knight "protested" that he had been drinking because he "recognized that he was not fit to drive." (Pet. at 3). Once again, these statements are not borne out by the record.

In the first instance, the evidence shows that Deputy Blunt told Knight only that if he did not leave Croteau's property, Croteau would have him arrested for trespassing. (C.R. 159-160, 184). There is no evidence that Deputy Blunt physically put Knight into the truck or even told him to get inside, much less that Deputy Blunt actually told Knight to drive. Nowhere in the record does anyone suggest that Knight had to drive his truck in order to leave the premises. Knight was free to walk off of Croteau's property had he felt that he was not capable of driving, or he could simply have requested that Deputy Blunt or someone else provide him with a ride home.

In the second instance, the fact that Deputy Blunt did not learn that Knight had consumed alcohol until after he

informed Knight of Crōteau's intentions is a far cry from the protest of drunkenness on Knight's part to which the petitioners refer.

(b) Course of Proceedings and Dispositions Below

Although the petitioners have, for the most part, accurately described the proceedings below, their treatment of the Court of Appeals' decision is unfair and distorted. The Court of Appeals did not affirmatively "conclude[ ] that a reasonable jury could find that Deputy Blunt had intentionally and knowingly ordered a drunk onto Wood County roads just moments before the drunk ran a stop sign and killed a family of four." (Pet. at 6). What the Court of Appeals actually said is that "[the petitioners'] summary judgment evidence shows that Blunt, when he told Knight to leave the premises, essentially instructed Knight to drive his vehicle while intoxicated. Blunt denies this and claims that he did not observe any signs that Knight was intoxicated, but for the purposes of summary judgment analysis all evidence favoring [the petitioners] will be taken as true." (Pet. App. 2-3).

REASONS FOR DENYING THE WRIT

Nothing in the Tyler Court of Appeals' disposition of this case warrants review by this Court. The decision neither resulted from a split among the circuits of the United States Courts of Appeal nor created a conflict between state courts of last resort. Neither did the Tyler Court of Appeals decide an important federal question in conflict with a relevant decision of this Court. In fact, the

Tyler Court of Appeals' decision in this case is directly in keeping with this Court's pronouncements regarding Fourteenth Amendment constitutional tort law.

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR THIS COURT TO ADDRESS THE PETITIONERS' AFFIRMATIVE GOVERNMENTAL COERCION THEORY, BECAUSE THAT THEORY WAS NOT PROPERLY RAISED IN THE TRIAL COURT.

The petitioners go to great lengths to present their case under a theory of affirmative exercise of governmental authority to coerce a private citizen to commit a life-threatening crime, condescendingly chastising everyone from the Tyler Court of Appeals to the respondents for failing to recognize it as such. (Pet. at i, 7-8). That is not, however, the theory under which the petitioners properly presented their lawsuit to the trial court. Instead, the petitioners averred before the trial court that Deputy Blunt "created, or especially contributed to the creation of a danger, or rendered [the petitioners'] Decedents more vulnerable to a danger of being killed or seriously injured by said Defendant Richard Royce Knight by his operation of a motor vehicle in a state of intoxication." (C.R. 31). No theory of affirmative governmental coercion of unlawful private activity was properly pled, nor was any such theory raised by the petitioners in response to the respondents' motion for summary judgment.

In this Court, the petitioners have taken pains to distance themselves from the state-created danger theory that they pled below. That theory is not encompassed by

the Questions Presented (Pet. at i) and, therefore, is not before the Court. *See* Sup. Ct. R. 14.1(a).

The petitioners' affirmative coercion theory represents no more than an attempt by counsel to transform this case on appeal in an attempt to suggest conflict between the Tyler Court of Appeals' decision and this Court's Fourteenth Amendment jurisprudence – thereby attempting to meet this Court's consideration criteria. *See* Sup. Ct. R. 10(c). This Court will not, however, consider an issue not properly presented to the trial court. *See McGrath v. Manufacturers Trust Co.*, 338 U.S. 241, 249 (1949). Accordingly, the petitioners' affirmative coercion theory is not properly available for this Court's consideration in this case, and their petition for a writ of certiorari should be denied.

II. EVEN IF PETITIONERS' AFFIRMATIVE GOVERNMENTAL COERCION THEORY HAD BEEN PROPERLY RAISED IN THE TRIAL COURT, THE DECISION OF THE TYLER COURT OF APPEALS WOULD NOT CONFLICT WITH THIS COURT'S FOURTEENTH AMENDMENT JURISPRUDENCE BECAUSE DEPUTY BLUNT'S CONDUCT DID NOT RISE TO A CONSTITUTIONALLY CULPABLE LEVEL.

This Court has recognized time and time again that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.' " *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)). "[T]he Due Process Clause was intended to prevent government officials 'from abusing [their] power, or employing it as

an instrument of oppression.' " *County of Sacramento v. Lewis*, 523 U.S. at 846 (quoting *Collins v. City of Harker Heights*, 503 U.S. at 126 (in turn quoting *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989) (in turn quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)))). What the Due Process Clause does not do is "purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986); *see County of Sacramento v. Lewis*, 523 U.S. at 848 (quoting same).

If the petitioners had properly pursued an affirmative coercion theory in the trial court, then defining the distinction between traditional tort law and constitutional culpability would have been critical to determining Deputy Blunt's culpability in this case. Potentially culpable injurious conduct falls on a spectrum from negligent to intentional – negligence representing the lowest end, where traditional tort liability is customarily placed but constitutional liability is not, and intent to injure representing the highest end, where constitutional liability for governmental acts consistently lies. *See County of Sacramento v. Lewis*, 523 U.S. at 848-49. Between those extremes, however, is a range of conduct which will be constitutionally culpable only when, under the specific circumstances of the case, it "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. at 850.

On that range of conduct between negligence and intent to harm lies conduct amounting to deliberate indifference. *See County of Sacramento v. Lewis*, 523 U.S. at 849-50. The petitioners mistakenly assume (1) that government conduct which is deliberately indifferent is

always constitutionally culpable as a substantive due process violation (except under certain emergency circumstances, essentially limited to high speed chases or prison riots), and (2) that Deputy Blunt's conduct was deliberately indifferent.[2] (Pet. at 13 n.7). Deliberate indifference is not, however, the test for constitutional culpability for due process violations – the test is whether that conduct "shocks the conscience." *See County of Sacramento v. Lewis*, 523 U.S. at 846-47.

That is not to say that deliberate indifference can never be conscience-shocking. This Court has found deliberate indifference sufficient to sustain substantive due process culpability in the context of failure to provide adequate medical care for prisoners. *See County of Sacramento v. Lewis*, 523 U.S. at 850 (acknowledging that "deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial"); *Canton v. Harris*, 489 U.S. 378, 388-389 (1989) (using a deliberate indifference standard to gauge a substantive due process violation for failure to train employees regarding adequate medical care for prisoners). The Court has also recognized, however, that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another, and . . . preserving the constitutional proportions of substantive

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[2] Ultimately, whether Deputy Blunt's conduct was deliberately indifferent under the Due Process Clause is irrelevant in light of the fact that, as demonstrated below, Deputy Blunt's conduct was not conscience-shocking under the circumstances of this case.

due process demands *an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." County of Sacramento v. Lewis*, 523 U.S. at 850 (emphasis supplied).

The petitioners contend that Deputy Blunt was engaged in "routine police work" and therefore his conduct was egregious enough to be constitutionally culpable. (Pet. at 13 n.7). An "exact analysis of circumstances" demonstrates, however, that Deputy Blunt's conduct, while perhaps negligent, was not sufficiently egregious to state a substantive due process claim.

Deputy Blunt responded to a domestic disturbance call at the Croteau residence. The petitioners point to evidence suggesting that Knight exhibited signs of drunkenness earlier in the day, but none that Knight appeared intoxicated when Deputy Blunt arrived on the scene. In fact, Deputy Blunt testified that Knight did not exhibit any of the classic signs of intoxication. In interviewing Croteau, Deputy Blunt found her distraught over Knight's displays of jealousy and learned of her intent to press charges against Knight for trespassing if he did not vacate her property. Deputy Blunt then conveyed that information to Knight and, viewing the facts in the light most favorable to the petitioners, instructed Knight to leave.

The question before the Court, then, is whether handling a domestic disturbance call by sending the source of the problem on his way amounts to deliberate indifference that shocks the conscience. Did Deputy Blunt's failure to recognize Knight's intoxication and his subsequent instruction to Knight (not that Knight drive but

merely that he leave Croteau's property) rise to the level of egregious conduct that courts should deem (1) closer to intent to injure the Harrises than to negligence and (2) so much closer to intent to injure that it shocks the conscience? It did not.

Even if, hypothetically, Deputy Blunt had known to a certainty that Knight was intoxicated, it could not be said that he knew, much less intended, that Knight would choose to drive home and that the Harrises would be injured. Deputy Blunt had no way of knowing that the Harrises (or anyone else for that matter) would be on the road, nor that if Knight were to drive home while intoxicated he would join the ranks of those intoxicated drivers who kill rather than the countless intoxicated drivers who manage to avoid serious incident. In the absence of such knowledge, any instruction that Deputy Blunt might have given to Knight to leave or face arrest cannot amount to more than a negligent act, and a negligent act does not constitute a substantive due process violation. *See County of Sacramento v. Lewis*, 523 U.S. at 848 (deeming "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process").

In discussing when deliberate indifference is insufficient to shock the conscience, this Court has shown its conscience less apt to be shocked where the conduct in question arises in law enforcement situations involving "obligations that tend to tug against each other." *County of Sacramento v. Lewis*, 523 U.S. at 853 (discussing the dual obligations of prison guards to restore order without demonstrating a lack of restraint *and* the responsibility of police in a chase situation to apprehend suspects while not unnecessarily endangering the suspect or

bystanders). Here Deputy Blunt was faced with competing needs for safety on the part of the motoring public on the one hand and a property owner who felt threatened enough by Knight to call the police on the other. One is forced to wonder what the result would have been if Deputy Blunt had allowed a belligerent Knight to remain on the Croteau premises without comment, and further disturbance had ensued. Could that, too, not have led to a different kind of tragedy for which the respondents would be called to court by a different bereaved family?

Deputy Blunt was called on in the course of his duty to put an end to a disturbance, and that is what he did. He was not a guard leisurely considering provision of medical treatment for a prisoner in custody; he was a law enforcement officer, alone in the field at night, assessing and responding to a potentially volatile domestic disturbance. *Cf. Graham v. Connor*, 490 U.S. 386, 397 (1989) (recognizing that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving").

Deliberate indifference does not shock the conscience in this instance because Deputy Blunt's actions arose out of his field evaluation (whether right or wrong) of the proper balance between the need to conclude a disturbance, diffusing the possibility of immediate danger to Croteau and her guests (and potentially to Knight himself), and the array of harm that might have resulted from instructing Knight to leave.[3] Because Deputy Blunt's

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[3] If a disturbance participant's potential to injure others makes instructing him to leave the scene of a disturbance

conduct, while possibly negligent, was not conscience-shocking, the Tyler Court of Appeals correctly determined that it will not support a substantive due process violation. The petition for a writ of certiorari should therefore be denied.

III. THE TYLER COURT OF APPEALS REACHED THE PROPER RESULT BECAUSE THE ALLEGED DEPRIVATION OF CONSTITUTIONAL RIGHTS WAS NOT CLEARLY ESTABLISHED AT THE TIME OF THE OCCURRENCE.

Even if the petitioners had properly raised their affirmative coercion theory, and even if Deputy Blunt's conduct had been sufficiently close to intent to injure to be constitutionally culpable, the respondents would be entitled to qualified immunity, because the alleged deprivation of constitutional rights was not clearly established at the time of the occurrence. The issue of qualified immunity "turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted); *see*

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constitutionally culpable, then law enforcement officers will face an impossible conundrum. Unless and until Knight refused to leave the premises after notice to do so, Deputy Blunt had no basis under Texas law to arrest Knight. TEX. PENAL CODE § 30.05. Nor could Blunt force Knight to accept a ride home. (Query whether, in any event, this Court wants to constitutionally obligate law enforcement officers to operate a volunteer taxi service.) Ultimately, then, Deputy Blunt's only option was allegedly to stand back and allow the disturbance to escalate.

Wilson v. Layne, 526 U.S. 603, 614 (1999). To be "clearly established" for qualified immunity purposes,

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that **in the light of pre-existing law the unlawfulness must be apparent**.

Wilson v. Layne, 526 U.S. at 614-15 (quoting *Anderson v. Creighton*, 483 U.S. at 640) (emphasis supplied).

In support of their affirmative coercion theory, the petitioners cite cases arising in a variety of contexts and under a variety of constitutional provisions, but none considering allegations of substantive due process violations by law enforcement officers. For example, the petitioners cite *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), for the proposition that "state officials are responsible for private decisions when they have 'exercised coercive power' or 'provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State.' " (Pet. at 15). The Court will note that *Blum* arose out of a claim of procedural rather than substantive due process under the Fourteenth Amendment. 457 U.S. at 996-97. Furthermore, *Blum* concerned private nursing home patients who alleged that they had not received certain procedural safeguards in conjunction with decisions by the home's utilization review committee to transfer them to a lower level of care, which in turn led to the reduction in their Medicaid

benefits. 457 U.S. at 994-96. This Court concluded in *Blum* that there were insufficient indicia of state action to implicate the Fourteenth Amendment simply because the State acted in accordance with private decisions in adjusting Medicaid benefits. 457 U.S. at 1005.

In addition to *Blum*, the petitioners cite *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546-47 (1987), for the proposition that "governmental coercion or encouragement required before private decision will be deemed a governmental decision." (Pet. at 15-16). *San Francisco Arts* considered whether the United States Olympic Committee was a governmental actor for the purposes of evaluating a Fifth Amendment discrimination claim. 483 U.S. at 542. In that instance, this Court found that the Committee's decision to enforce its exclusive right to use the term "Olympic," thereby denying San Francisco Arts & Athletics the opportunity to sponsor an event entitled the "Gay Olympic Games," "simply is not a governmental decision." 483 U.S. at 547 (emphasis supplied).

While both *Blum* and *San Francisco Arts* include recitations of some general principles concerning governmental liability for private decisions made under the influence of governmental coercion, neither case includes a holding to that effect. *See Blum v. Yaretsky*, 457 U.S. at 1004; *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. at 546. Not only did this Court find no such coercion in either case, but neither opportunity was utilized to further explain the general principles recited or provide examples of coercion sufficient to impute liability. Furthermore, neither case is (1) remotely factually similar to the case at bar or (2) decided

under the substantive due process component of the Fourteenth Amendment – the constitutional provision at issue here.[4]

The respondents do not profess to be constitutional scholars, nor does the Constitution require them to be. A reasonable law enforcement officer cannot be expected to sift through the pile of Establishment Clause, equal protection, and procedural due process cases involving finances of nursing home patients, the use of confessions against criminal defendants, and the use of the term "Olympics" by homosexual interest groups to determine that they should refrain from handling domestic disturbance calls by sending the source of the problem away because that individual could injure a third party after leaving.

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[4] Likewise, this Court's other cases relied on by the petitioners in support of their affirmative coercion theory are equally inapplicable. *See Lee v. Weisman*, 505 U.S. 577, 631 (1992) (**First Amendment** decision finding a school's endorsement of religion, not their coercion of a private actor, to violate the Establishment Clause); *Arizona v. Fulminante*, 499 U.S. 279, 283-88 (1991) (**Fourteenth Amendment** decision finding **harmless error** in admission of a coerced confession obtained, not by a mere private citizen, but by a paid FBI informant); *Coolidge v. New Hampshire*, 403 U.S. 443, 488-90 (1971) (**Fourth Amendment** decision finding **no state action** in support of a constitutional violation when the spouse of a criminal defendant cooperated with police); *Massiah v. United States*, 377 U.S. 201, 207 (1964) (**Sixth Amendment** decision prohibiting the use of a confession obtained by a co-defendant turned federal agent against a defendant following his indictment in the absence of counsel).

This is particularly true in light of the Sixth Circuit's decision in *Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995), decided prior to the incident at issue. *Foy* held that a command to young adults known to be under the influence of alcohol to drive away or face arrest – a command indistinguishable from that alleged in this case by the petitioners – was not an arbitrary exercise of state power, and, consequently, not a violation of substantive due process. *See* 58 F.3d at 231 ("The officers may have used bad judgment in telling Foy and Phillips to get in the car and leave, but this command was not an example of arbitrary exercise of the state's power."). Where a circuit-level opinion exists finding no constitutional violation on virtually indistinguishable facts, and no contrary opinion exists on comparable facts, the existence of a violation cannot possibly be clearly established for qualified immunity purposes. To the extent that this Court would find that Deputy Blunt's conduct violated the Harrises' substantive due process rights, those rights were not clearly established at the time of the incident. Hence the respondents are entitled to qualified immunity, and the petition for a writ of certiorari should be denied.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be denied in this case.

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In The

Supreme Court of the United States

SUE RIVERS, PERSONAL REPRESENTATIVE of the ESTATE of BOBBY LYNN HARRIS, DECEASED; DANNA TAYLOR, PERSONAL REPRESENTATIVE of the ESTATE of LETRICIA KAY HARRIS, DECEASED; SUE RIVERS and DANNA TAYLOR, as CO-PERSONAL REPRESENTATIVES of the ESTATE of CARRIE GAIL HARRIS; SUE RIVERS and DANNA TAYLOR, as CO-PERSONAL REPRESENTATIVES of the ESTATE of CANDY MICHELLE HARRIS; DELLA RUTH HARRIS; and EDGAR BLANKENSHIP,

Petitioners,

v.

WOOD COUNTY, BILL SKINNER and BILLY BLUNT,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Twelfth Judicial District Of Texas

PETITIONERS' REPLY

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REPLY

Nothing in Respondents' Brief in Opposition contradicts that which is essential to the Petition:

1) That the summary judgment evidence would support a jury finding that Deputy Blunt deliberately ordered a private citizen to drive while intoxicated, criminal activity that directly resulted in the deaths of all four members of the Harris family; and

2) That the court of appeals nevertheless ruled that Deputy Blunt's command did not violate the Fourteenth Amendment.

Though Respondents acknowledge at least this much, at page i and 5 of their Brief, they nevertheless attempt to "muddy up" the clearly presented issue in this case with the usual transparent tactics. First, Respondents attempt to muddy the otherwise clear factual waters of this case by ignoring its procedural posture and making what amount to jury arguments, putting their own biased "spin" on the summary judgment evidence, essentially treating Deputy Blunt's own self-serving testimony as conclusive. Second, Respondents dredge up a lame waiver argument that was rejected in the district court and never even raised in the court of appeals, which clearly reached and resolved the merits of the question presented in the Petition. Finally, Respondents attempt to muddy the clear legal waters in this case by spending the brunt of their brief arguing two legal points that were never reached by the court of appeals, including one that was not even a subject of Respondents' summary judgment motion in the district court. Lost in all of Respondents' mud slinging is their failure to marshal even one argument that counsels against this Court granting review of the constitutional point presented in the Petition, a point that the court of appeals clearly resolved in a way that directly conflicts with this Court's precedent.

I. In Utter Denial Of The Procedural Posture Of This Case, Respondents Continually Ignore The Genuine Issues Of Material Fact Raised By The Summary Judgment Evidence, And Present Only Their Own Version Of What Happened.

Essentially, Respondents' view of the evidence relies on Deputy Blunt's own self-serving testimony and ignores virtually everything else. It is true that Blunt is the only living witness to his conversation with the drunk. The drunk is dead, along with the four innocent citizens he took with him. The drunk's ex-girlfriend, and everyone else at her place, were also drunk, and indoors at the time of the critical conversation (C.R. 156-158, 173, 195-196). Nevertheless, Blunt's awareness of the drunk's degree of intoxication at the time Blunt ordered him to drive away can be established through circumstantial evidence. And there is abundant circumstantial evidence in the summary judgment record that contradicts Blunt's testimony. *See* Petition, 2-5. As the court of appeals recognized, the "summary judgment evidence shows that Blunt, when he told Knight to leave the premises, essentially instructed Knight to drive his vehicle while intoxicated." Petition, App. 2.

Respondents will be free at trial – if there is one – to argue that Deputy Blunt observed no signs of intoxication in an individual who was noticeably drunk before driving to his ex-girlfriend's residence, who had four more beers while standing outside her residence creating a domestic disturbance, whose blood-alcohol content was .17 just minutes after Blunt ordered him to leave, and who, upon being instructed to leave, protested to Blunt that he'd been drinking. Respondents will also be free to present the rest of their jury arguments at trial – *e.g.*, that it is a "distortion" for Petitioners to argue that Blunt ordered Knight to drive drunk, when he really only "instructed" or "told" the drunk to "leave the scene." After all, the Respondents argue at page 4, Deputy Blunt can hardly be held responsible when the drunk, leaning

against his pickup on private rural property, and informed that he would be arrested for trespassing if he did not leave, chose to drive rather than walk away. Besides, Respondents continue at page 11, Blunt did not know that anybody else, much less the Harrises, would be using the roads at that time.

Given the procedural posture of this case – decided on summary judgment – this Court is certainly not the forum for Respondents to employ their creative "spin" on the evidence. Instead, as the court of appeals recognized (Petition, App. 3), it is the summary judgment evidence that supports *Petitioners' version* of the events, and the reasonable inferences to be drawn therefrom, that constitutes the applicable "Statement of Facts" for purposes of ruling on the Petition. And Petitioners would gladly welcome an inquiry by this Court into the summary judgment record if it has any doubts as to which party's version is a "distortion."

II. A Constitutional Point That Is Raised At Every Level Of The Proceedings, And That Was Resolved On The Merits By The Court Whose Opinion Is The Subject of The Petition, Is Not Waived.

The Petitioners have been arguing *Blum v. Yaretsky*'s state-coercion theory of state action since the very beginning of this litigation. Petitioners' state court pleading could not have been clearer. Blunt violated § 1983 "by instructing" and "by ordering" the drunk to drive the vehicle. (¶¶ 83, 84). Indeed, Blum's coercion theory was central to the argument that convinced the district court ultimately to rule in Petitioners' favor on summary judgment. *Blum's* coercion theory was a centerpiece of the briefs submitted to the court of appeals, and that court decided *Blum's* applicability on the merits. *See* Petition, App. 7-12. *Blum* was also one of a number of state coercion cases brought to the Texas Supreme Court's attention in the Petition for Review (at pp. 3-6, 9-12) filed in that court; indeed, the Petition for Review filed in the Texas

Supreme Court raised the very same points raised in the Petition for Writ of Certiorari. It is well-settled that this Court will not find a constitutional point waived when the state court has reached the issue on the merits and the issue is clearly presented in a Petition for Writ of Certiorari. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971). Thus, it is inconceivable that the question presented by Petitioners has somehow been waived.

Respondents' waiver argument is particularly disingenuous given that they did not even raise the waiver point in either the court of appeals or in the Texas Supreme Court. The only court in which Respondents contended that the state coercion theory of governmental accountability had been waived was in the district court, which rejected the Respondents' contention without discussion in denying Respondents' motion for summary judgment. Respondents' "waiver" argument in the district court was part of their ongoing refusal to acknowledge that this is a governmental coercion case governed by long settled Supreme Court precedent. Respondents obstinately insist that this is a "state-created danger" case (Respondents' buzzwords for a case alleging a mere passive failure to intervene in private activity), a legal theory whose contours, according to Respondents, can be debated in the aftermath of *DeShaney*. Apparently, Respondents believe that they will have a stronger argument for qualified immunity if the constitutional principles involved are new ones that have been generated by this Court's decision in *DeShaney*, rather than if the principles involved are old ones in no way unsettled by *DeShaney*.

The court of appeals obviously saw the issue in this case as one generated by (and hence governed by) *DeShaney*. The Petition for Writ of Certiorari espouses the contrary view – that this case is governed by a theory of state action that predates *DeShaney*, was not at issue in *DeShaney*, and clearly survives *DeShaney*. However this

matter is resolved, it is beyond dispute that Petitioners did not "waive" the constitutional point that is at the heart of their Petition for Writ of Certiorari. Moreover, Respondents abandoned their "waiver" argument on appeal, probably due to the chilly reception it received in the district court. Finally, the court of appeals reached and resolved (albeit adversely to Petitioner) the Petitioners' contention that this case is controlled by *Blum v. Yaretsky* and other decisions of this Court holding governmental officials constitutionally accountable for private party action that the officials themselves have used their governmental authority to incite.

III. Instead Of Confronting The Legal Issue Actually Decided By The Court Of Appeals, Which Is, Consequently, The Subject Of The Petition, Respondents Attempt To Avoid The Issue By Arguing Legal Points Neither Expressly Nor Even Implicitly Decided Below.

As urged throughout the Petition, the court of appeals' decision in this case is fundamentally contrary to the precedents of this Court that hold a governmental official constitutionally accountable for private party actions taken in compliant response to an order or command issued by the official. For all practical purposes, the court of appeals interpreted *DeShaney* (wrongly) to overrule this Court's state coercion precedent. If this Court had issued the same opinion as the court of appeals, the only possible interpretation would be that the Court had overruled *Blum v. Yaretsky* and all the rest of its decisions holding that private activity commanded by state officials is state activity for which the commanding officials are constitutionally accountable.

Respondents nowhere squarely confront the conflict with this Court's precedent generated by the state courts' ultimate resolution of this issue. Instead, the Respondents spend nearly 10 pages of their brief, pages 7-17, arguing legal points that were no part of the court of appeals'

decision, including one that was not even raised in their summary judgment motion.

First, on pages 7-13, the Respondents argue that ordering a private citizen to drive while intoxicated is not "conscience-shocking," contending that "deliberate indifference" does not always constitute a "conscience-shocking" exercise of power, and attempting to compare the routine domestic disturbance confronted by Deputy Blunt with the high speed chase involved in *Sacramento v. Lewis*. Respondents' argument suffers from several fatal flaws. First, Respondents' summary judgment motion never even raised this point. Indeed, in the district court, Respondents fully acknowledged that "deliberate indifference" was the controlling standard. Motion for Summary Judgment, at 13-14. The first time that Respondents argued that the "conscience-shocking" standard might require more than "deliberate indifference" in this case was in their rebuttal at oral argument in the court of appeals. Second, and more fundamentally, the court of appeals' decision neither resolves nor even acknowledges this "issue." If there is ever a trial in this case, Respondents can submit proposed jury instructions and press this point then.[1] Additionally, the Respondents will be free to argue, again at trial, that the drunk appeared to Blunt to be just a little bit drunk, or that the drunk was good at hiding his drunkenness, and that, as a consequence thereof, Blunt's exercise of authority was less than "conscience-shocking." Ultimately, however, since the degree of outrageousness of Deputy Blunt's exercise of authority depends on the degree of obviousness of the private citizen's intoxication, and perhaps the degree of

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[1] Though it's not much of a point. To apply *Sacramento v. Lewis'* heightened "intent to harm" standard to routine situations regularly confronted by officers would not only cut the *Lewis* standard free from its emergency rationale, it would make the "deliberate indifference" standard the exception rather than the general rule for demonstrating "conscience-shocking" behavior.

his intoxication, the issue of whether Blunt's use of authority is or is not "conscience-shocking" is a classic jury question.

Second, on pages 13-17 of their brief, Respondents make a qualified immunity argument. The court of appeals decided only that Petitioners' claims against Deputy Blunt failed to allege the deprivation of a constitutional right. *See* Petition, App. 13. Consequently, the court of appeals declined to reach the qualified immunity issue. *See id.* Furthermore, had the court of appeals correctly applied this Court's state coercion precedent, it is far from clear how Deputy Blunt could get off the hook on qualified immunity grounds. The state coercion theory of constitutional accountability, as well as every other legal doctrine that plaintiffs rely on to establish Blunt's § 1983 liability, were clearly established at the time Deputy Blunt issued his ill-fated command. To put it succinctly, a reasonable officer in Deputy Blunt's position surely would have understood that ordering a drunk to commit a life-threatening crime is contrary to settled law. *See Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). In any event, the court of appeals did not address this issue, and there is no need for this Court to address it, although Petitioners would gladly brief the qualified immunity issue should the Court ultimately desire to reach that issue as a consequence of its granting review.

IV. Reviewing This Case And Deciding It Correctly Would Place No Cost On Any Governmental Entity Or Official Except Those Officials Who Deliberately Abuse Their Authority By Ordering Private Citizens To Engage In Life-Threatening Criminal Conduct That Directly Results In Death.

At least since this Court decided *Blum v. Yaretsky* in 1982, an official clothed with authority under state law has been required, under threat of individual liability pursuant to 42 U.S.C. § 1983, to avoid exercising that authority to coerce private citizens to engage in conduct

that threatens fundamental constitutional freedoms. 457 U.S. 991, 1004. Consequently, this Court should have no concern about "opening the floodgates" to challenges to police authority. Whatever "floodgate" exists has already been opened by this Court. And experience has shown that there is no "flood" of litigation alleging that governmental officials have coerced private parties into conduct that undermines constitutional values. Hopefully, that is because an abuse of authority such as occurred in the present case is so egregious that it happens only infrequently.[2] Truly, this is a case that this Court can decide without imposing any cost on honest, competent public officials.

Deciding this case correctly would impose a cost only on those public officials who, like Deputy Blunt, deliberately abuse their authority by ordering private citizens to engage in life-threatening criminal conduct. Deciding this case correctly would leave numerous options for police to deal with drunk drivers (or drunken "soon to be" drivers) without incurring even the slightest risk of liability. Indeed, a police officer would remain free to do nothing. If an officer sees a drunk driver and decides not to pull him over, that is an *o*mission rather than a *co*mission and therefore not an appropriate basis for liability under the Due Process Clause. *See DeShaney v. Winnebago Dept. of Social Services*, 489 U.S. 189, 195-201 (1989); *see also* Petition, at 18-22 (explaining the fundamental constitutional difference between governmental omissions and affirmative exercises of governmental authority). If an officer sees a drunk about to get in a car, *DeShaney* absolutely protects the officer who chooses to do nothing. *See id.* If an officer stops a car and determines that the

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[2] Or, perhaps drunks are ordered onto the highway more often than we want to believe, but litigation does not arise when those drunks make it home without killing anyone. Or, perhaps it's difficult to prove such an order when the only two witnesses are the officer and the drunk, who, as in this case, is often killed as a result of the accident.

driver is drunk but permits the drunk to continue driving, again *DeShaney* forecloses liability. *See id.* If an officer stops a driver and fails to determine that the driver is drunk and allows the driver to continue on his way, again *DeShaney* absolutely protects the officer. *See id.* Under *DeShaney*, an officer can try to alleviate the danger; or, an officer can choose to ignore the danger; or, an officer can fail to appreciate the danger; or, an officer can intervene but then, for any reason or no reason, choose to leave the situation as he found it, leaving the problem utterly unsolved – *all without any possible threat of liability. See id.* The only thing the officer cannot do, and confidently avoid liability, is what Deputy Blunt did in the present case – affirmatively exercise his authority to put a drunk on the highway who would not otherwise be on the highway. In such a case, the officer's exercise of authority is the very *source* of the threat that the private party poses to the public. Consequently, the dangerous behavior of the private actor becomes state-ordered behavior (or, state action) for which the commanding official is constitutionally responsible. *See Blum*, 457 U.S. at 1004; *see also* Petition, at 7-8, 14-17.

Additionally, though there may be numerous situations in which officers issue orders to private citizens, officers have little occasion to order citizens to commit life-threatening crimes. Short of such an obviously and flagrantly inappropriate order, it will not be possible to establish that the officer engaged in "conscience-shocking" behavior that directly resulted in death, which is essential to making out a violation of the Due Process Clause. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). "Conscience-shocking" police behavior consists of "deliberate indifference" to an obvious threat to life, a mental state that the United States Supreme Court has equated with *criminal* recklessness. *Id.* at 849-50; *Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994). Inherently, then, the threat of liability posed to police officers by a correct

decision in the present case will impact only those officers who commit the most egregious abuses of authority, and who are therefore appropriately *deserving* of liability.

CONCLUSION

Because recovery against officials like Deputy Blunt is often foreclosed under state law, and because recovery against the governmental subdivisions that employ them is rarely achievable under § 1983, it is important to keep at least one avenue of recovery open to citizens injured or killed by exercises of state law authority such as the one involved in the present case. But that avenue, too, will be closed if this Court permits the *DeShaney* principle to swallow *Blum's* state coercion theory of official accountability. This is an important case, a case that as it currently stands sets a precedent that undermines one of this Court's fundamentals of constitutional adjudication.

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